No. 83-894

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

HAROLD LEVY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION

For a Writ of Certiorari to the
United States Court of Appeals for
Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Was petitioner denied a fair trial due to the government's suppression of exculpatory evidence and the trial judge's failure to permit the deposition of a necessary witness?

II. Was not the Drug Enforcement Administrator's summary criminalization of phenyl-2-propanone as an immediate precursor of controlled substances, which was done by final order without notice of proposed rulemaking or prepromulgation time for public comment, invalid due to the failure of the administrator to comply with the rule making requirements of section 553 of the Administrative Procedure Act?

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Harold Levy hereby petitions that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment at No. 82-1477.

OPINION BELOW

The Court of Appeals affirmed Petitioner's conviction by order and opinion filed August 30, 1983 which is published at 715 F.2d 843 (3d Cir. 1983) and which is reproduced at A-1. On September 29, 1983, a petition for panel rehearing was denied; on October 12, 1983, a stay of issuance of the certified judgment in lieu of mandate was granted to November 28, 1983. That order is appended hereto at A-23.

JURISDICTION

Harold Levy was convicted by a jury upon Indictment No. 82-12 in the Eastern District of Pennsylvania. He was sentenced to a term of imprisonment of five (5) years and to pay a fine of five thousand dollars ($5,000.00). Mr. Levy was admitted to bail pending appeal. His conviction was affirmed by the United States Court of Appeals for the Third Circuit on August 30, 1983, and panel rehearing was denied on September 29, 1983. (A-22) Issuance of a certified judgment in lieu of mandate was stayed to November 28, 1983 by order dated October 12, 1983. (A-23)

This Court's certiorari jurisdiction is established by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

The issues presented call upon this Court to construe and apply the Fifth Amendment to the constitution of the United States which provides in pertinent part:

> "No person shall be... deprived of life, liberty, or property, without due process of law...."
> USCS Constitution, Amendment Five.

STATEMENT OF THE CASE

Harold Levy was charged with having participated in a conspiracy from 1978 until 1982 to manufacture and distribute methamphetamine and to distribute and possess with intent to distribute phenyl-2-propanone (P2P) in violation of 21 U.S.C. §846. Petitioner's indictment was consolidated for trial with several related indictments of other persons who were alleged to have been members of the conspiracy. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, Harold Levy was convicted and sentenced to five (5) years imprisonment and fined five thousand dollars ($5,000.00).

The indictment alleged that one Ronald Raiton, in partnership with a co-defendant, masterminded an international scheme to obtain and distribute P2P from 1978 to 1982. P2P, a precursor in the

manufacture of methamphetamine, was not listed as a controlled substance until February, 1980, and its possession was not a criminal offense in the United States until that time unless it was possessed for the purpose of illegally manufacturing methamphetamine. Although Raiton was at the top of a pyramidal network of numerous underlings who carried out and facilitated his schemes, Raiton entered into a plea agreement with the federal government in April, 1981, whereby he received an extraordinarily lenient sentence in return for his cooperation in obtaining indictments and convictions of other people, especially those who worked for him in his P2P network.

In 1978, Harold Levy was an attorney from whom Ronald Raiton leased office space. On occasion, Levy would perform legal services for Raiton; in November,

1978, Levy attempted to negotiate with the United States Attorney's office the return of a ten gallon shipment of P2P to Test Tech, Inc., Raiton's company. The Drug Enforcement Administration had seized the shipment, even though it was not illegal to possess P2P in the United States at that time. On instruction and information from his client, Ronald Raiton, Harold Levy informed the United States Attorney's office that the shipment was intended ultimately for a buyer in Africa whose name and address he supplied. The federal government did not release the shipment despite Levy's representation, pursuant to his client's instruction, that the shipment was intended solely for export.

Also acting as Raiton's attorney, Levy prepared the necessary paperwork to

accomplish the formation of certain Bahamian corporations which Raiton subsequently used for his private investment purposes. There was testimony at trial that Raiton utilized certain Bahamian corporations as one of several means of secreting his millions of dollars in profits from his illegal operations. There was no testimony whatsoever that Levy had any involvement in this aspect beyond his legal services in formation of the corporations.

The last and only significant aspect of the government's allegations of Levy's participation in Raiton's empire concerned LK Forwarding. Raiton testified that Theodore Karrys, a Canadian citizen, and Harold Levy formed a partnership in Canada known as LK Forwarding. This entity was to receive P2P in Canada which had been shipped from France through a London broker, Iraco, Ltd. The P2P had

been ordered not by LK Forwarding but by Stanley Industries, one of Raiton's American companies. Only Raiton's uncorroborated testimony alleged any participation by Levy in the purchase of P2P overseas for shipment to LK Forwarding in Canada; none of the purchase documents introduced by the government at trial evidenced any personal participation by Levy. Raiton testified that it had been his plan to purchase the P2P from LK Forwarding and to smuggle it into the United States from Canada, although he admitted that Levy was not involved in any aspect of bringing P2P from Canada into the United States. Raiton speculated at trial as to the amount of money which Levy and Karrys shared from the importation into Canada of P2P and based his speculations upon his testimony that eight (8) or

nine (9) shipments were received by LK Forwarding. The government introduced documents at trial which it claimed evidenced five (5) shipments from Iraco, Ltd. to LK Forwarding. However, the government withheld from Levy's trial counsel a January, 1980 statement from a Director of Iraco, Ltd. and supporting documentation which proved that only two (2) shipments were made and that the third and final shipment was seized by the Canadian government. Raiton had admitted at trial that subsequent to the seizure of P2P by Canadian authorities, no further orders were placed for shipment to Canada.

Theodore Karrys was indicted, but the government made no effort to extradite him from Canada until ordered to do so by the trial judge immediately prior to the commencement of Levy's trial. Karrys

was not extradited and has not been tried to date. On September 13, 1979, Theodore Karrys had been interviewed in Canada by Sergeant Reginald Chad, Royal Canadian Mounted Police, and Agent Richard Shapiro, Drug Enforcement Administration. Despite the fact that Agent Shapiro had traveled from Philadelphia all the way to Canada to interview Karrys regarding Raiton, Levy and LK Forwarding, he took no notes of the interview, a most unusual deviation from standard government procedures. Sergeant Chad tape recorded the interview and made written notations in a notebook. Despite numerous requests pretrial and during trial, and despite the promises of the federal government to provide it, and despite the orders of the trial judge to do so, the tape recording of Karry's interview was never provided nor made available to Levy or his counsel. Pretrial requests for leave to

depose Karrys in Canada were denied as were requests to delay the trial so that Karrys could be interviewed in Canada. Sgt. Chad was called as a witness at trial by Levy; Chad admitted that Karrys had told him during the interview in 1979 that when Levy was approached initially regarding formation of the partnership, Levy had asked Karrys what was to be forwarded. Upon being advised that it was P2P, Levy told Karrys that before Karrys did anything he should make sure that possession of P2P was legal in Canada. Karrys told Sgt. Chad that he inquired of the proper authorities and was advised that it was legal. Karrys further told Sgt. Chad that he dealt only with one person in the United States regarding LK Forwarding's activities; that person was Ronald Raiton.

Upon this evidence, Harold Levy was convicted of conspiracy to manufacture and

distribute methamphetamine and to distribute and possess with intent to distribute P2P. Levy was sentended to five (5) years imprisonment and fined five thousand dollars ($5,000.00).

ARGUMENT

I. Petitioner Was Denied A Fair Trial Due to the Suppression of Exculpatory Evidence By The Government and Due to the Failure of the Trial Judge to Permit Deposition of a Necessary Witness

The failure of the government to turn over to petitioner certain documents which could have been used to impeach the government's principal witness, whose testimony was largely uncorroborated, denied petitioner a fair trial. Brady v. Maryland, 373 U.S. 83 (1963). In United States ex rel Marzeno v. Gengler, 574 F.2d 730, 835 (3d Cir. 1978), the Court of Appeals recognized that "evidence impeaching the testimony of a government witness falls with the Brady rule when the reliability of the witness may be determinative of...guilt or innocence." Surely, Raiton's credibility was the prime issue for the jury to resolve in determining

Harold Levy's guilt or innocence. Since Raiton's testimony regarding Levy and LK Forwarding was the primary basis for Levy's conviction for participating in Raiton's conspiracy, it was vital to demonstrate to the jury the extent of Raiton's half-truths and total fabrications. One document among several suppressed by the government could have flatly disproved Raiton's claim that Levy ordered P2P from Iraco, Ltd. to be shipped to LK Forwarding in Canada. The document, a statement of a Director of Iraco, Ltd. taken by law enforcement authorities who concomitantly obtained supporting records, suggests that only Raiton and not Levy, Karrys or any other person dealt with Iraco. This statement and the supporting documentation were withheld by the government and only came to light in discovery proceedings in a subsequent, related case involving another

defendant. Petitioner's motion for a new trial on the basis of the government's withholding of this critical evidence was denied by the trial judge.

The government's failure to provide Brady material cannot be considered in a vacuum when assessing the harm engendered thereby. Only in combination with the preclusion of the testimony of Theodore Karrys is the devastating impact of the harm to Levy's defense measurable. By these means, the government successfully avoided any meaningful challenge to Raiton's credibility, and his largely uncorroborated testimony provided a sufficient basis for the jury's verdict. Theodore Karrys was the only person who could have disputed Raiton's testimony concerning LK Forwarding and its operations. Levy filed a pretrial motion seeking leave to depose Karrys and for immunity

for Karrys as a defense witness; it is conceded that the initial motion was properly denied at that time due to a lack of a sufficient factual basis presented to support the motion. However, subsequent complications and developments sufficiently demonstrated that Karry's testimony, whether by way of deposition or as an actual witness, was crucial to Levy's defense. Subsequent to the initial denial of Levy's petition, it was learned that the government had no real intention of prosecuting Karrys as evidenced by its total failure to even attempt to extradite him. The falsity of the initial claim that Karrys was a fugitive was demonstrated by proof that Karrys had lived at the same address in Canada for sixteen years and was listed in the telephone book. Later claims that

the government lacked resources to attempt extradition were summarily rejected by the trial judge. Thereafter it was learned that the D.E.A. agent who interviewed Karrys had no notes and had made no report of the interview. The government did not comply with the court's order to obtain and turn over a copy of the tape recording of the interview made by Sgt. Chad. Finally, after Sgt. Chad testified regarding his skimpy notes of the Karrys interview, the government was allowed to elicit from Sgt. Chad on cross-examination that Chad did not believe Karrys was telling the truth. Moreover, Sgt. Chad did not bring with him the tape recording of the interview of Karrys when Chad traveled from Canada to Philadelphia to testify in this case.

In addition to stating that he did not believe Karry's statement to be truthful,

Sgt. Chad's limited notes did not disclose whether he had questioned Karrys regarding: (1) the amount of P2P received in Canada; (2) who ordered it to be shipped to LK Forwarding; (3) what LK Forwarding did with the P2P; and (4) how much money, if any, was received by LK Forwarding and paid to Karrys and Levy. These areas of questioning were central to a determination of the truthfulness of Raiton's testimony. Consequently, it became evident during the trial, if not before, that Karrys' answers to these questions were vitally necessary if the jury were to make any meaningful assessment of the truth of Raiton's uncorroborated testimony.

In United States v. Wilson, 601 F.2d 95 (3d Cir. 1979), the defendant's pretrial request to depose a potential defense witness in a foreign country had been

denied primarily because the potential witness was a fugitive. The Court of Appeals for the Third Circuit held that a witness is not incompetent solely because he is a fugitive. Id. at 98. Nor is a codefendant precluded from testifying on behalf of another defendant. Washington v. Texas, 388 U.S. 14 (1967). In Wilson, the Court of Appeals found that "hindsight" required reversal for failure to allow the deposition of the potential defense witness.

> "Hindsight provides another reason for our conclusion that the deposition should have been permitted here. A trial judge's determinations, though correct at the time when made, may be reversed because of changes in the law occurring thereafter, and similarly, events that develop later may cast a different light on an earlier ruling. Though such circumstances may prompt a reversal by an appellate court, they obviously were not known to the trial judge when he made his ruling."
> United States v. Wilson, supra, at 98-99.

The Court in Wilson noted that the credibility of the government's principal witness was questioned and that without his testimony, the government had no case. For this reason, the testimony of the potential defense witness assumed increased importance. Id. at 99. The court further recognized that the credibility of the potential defense witness was not shown to be any stronger than that of the government's witness; yet, "there is much to be said for presenting all of the suspect evidence to the jury, thus facilitating its ability to cull the truth from doubtful sources." Id. Consequently, a new trial was required in Wilson even though the trial judge "could not have known" at the time of his pretrial ruling of the necessity for the potential witness' testimony and even though the possible testimony was only

"exculpatory to some extent." Id. at 98.

In this case, Levy's initial motion for leave to depose Karrys and for immunity for Karrys' testimony was admittedly deficient in that it was unsupported by affidavit or other proof. Nevertheless, it was denied without argument and Levy's subsequent requests for a continuance in order to obtain the necessary documentation to support the motion were similarly denied. Renewed motions were made throughout the trial as the testimony and subsequent disclosures made it apparent that Karrys' testimony or, at a minimum, the taking of his deposition in Canada was vitally necessary to Levy's ability to present a defense or in any meaningful way convince the jury that Ronald Raiton was not capable of belief. In every instance, the government opposed Levy's efforts to obtain this evidence, and in every instance the trial judge denied Levy's requests.

Without Raiton's testimony, the government had absolutely no case against Harold Levy. By virtue of the total denial to Levy of all means of proving that Raiton lacked credibility, the government obtained the conviction of Harold Levy. To this date, Theodore Karrys remains untried and has never been extradited from Canada for trial on this indictment. By precluding Levy from calling Karrys as a defense witness, by successfully opposing all efforts to obtain the deposition of Karrys, and by suppressing the tape recording of Karrys' interview as well as the statement and supporting documents obtained from the Director of Iraco, Ltd., the federal government succeeded in its goal of convicting an attorney of conspiracy. However, in so doing, the federal government denied Harold Levy the due process of law that our constitution guarantees all criminal defendants and denied him a fair trial.

For these reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit to review its affirmance of Harold Levy's conviction.

II. The Criminalization of P2P is Invalid Due to the Failure to Comply with the Administrative Procedure Act

Petitioner hereby adopts and incorporates by reference the issue raised by codefendant, William A. Catanese, in his petition to this Court for a writ of certiorari to the Court of Appeals for the Third Circuit which is now pending at No. 83-5005. In that petition, the sole issue presented is:

> Was not the Drug Enforcement Administrator's summary criminalization of Phenyl-2-Propanone (P2P) as an immediate precursor of controlled substances, which was done by final order without notice of proposed rulemaking or pre-promulgation time for public comment, invalid due to the failure of the administrator to comply with the rulemaking requirements of section 553 of the Administrative Procedure Act?

This issue has been preserved by petitioner as follows: In his brief filed in the Court of Appeals for the Third Circuit, petitioner

adopted the arguments of all of his co-defendants whose appeals had been consolidated. One such codefendant was Joseph DiSantis, Jr. whose brief in the consolidated appeal adopted the argument made by William Catanese in his appeal to the Third Circuit Court of Appeals at No. 82-1590 from his conviction upon a related indictment.

CONCLUSION

For the foregoing reasons, this Court is urged to grant a writ of certiorari to the Court of Appeals for the Third Circuit to review its judgment at No. 82-1477.

Respectfully submitted,

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Dated: Dec. 2, 1983

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1258/1534, 82-1477, 82-1478,
82-1479, 82-1485

UNITED STATES OF AMERICA,
Appellee

v.

DAVID GOMBERG,
Appellant in Nos. 82-1258/1534

UNITED STATES OF AMERICA,
Appellee

v.

HAROLD LEVY,
Appellant in No. 82-1477

UNITED STATES OF AMERICA,
Appellee

v.

MICHELLE D'AMICO,
Appellant in No. 82-1478

UNITED STATES OF AMERICA,
Appellee

v.

ALBERT SPIELVOGEL,
Appellant in No. 82-1479

UNITED STATES OF AMERICA,
Appellee

v.

JOSEPH DISANTIS, JR.
Appellant in No. 82-1485

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Crim. Nos. 82-00012 and 82-00013)

Argued April 28, 1983

Before: WEIS and HIGGINBOTHAM, *Circuit Judges*, and
BROTMAN, *District Judge**

Opinion Filed August 30, 1983

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*The Honorable Stanley Seymour Brotman, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

In these appeals from drug convictions, we reject the defendants' contention that a count charging a conspiracy with two objectives was duplicitous. We also find no merit to the challenge that there was a variance between the conspiracy alleged in the indictment and the evidence produced at trial. We agree, however, that a defendant sentenced under the Comprehensive Drug Abuse Prevention and Control Act for engaging in a continuing criminal enterprise should not also receive separate sentences for conspiracy and the underlying predicate offenses. As to the defendant convicted of the continuing criminal enterprise, we remand for resentencing. The convictions and sentences of the other defendants are affirmed.

A six-count indictment charged Joseph DiSantis, Jr., David Gomberg, Albert Spielvogel, and Michelle D'Amico with violations of the Comprehensive Drug Act, 21 U.S.C. §801 *et seq*. Count One charged all defendants with conspiracy under section 846 "to manufacture and distribute methamphetamine, and to distribute and possess with the intent to distribute phenyl-2-propanone." Harold Levy was charged in a separate indictment with participating in the conspiracy. The main indictment further alleged that defendants had violated various substantive provisions of the Act. In addition, DiSantis was charged with engaging in a continuing criminal enterprise, *id*. §848.

The two indictments were consolidated for a jury trial which lasted thirteen days. Much of the evidence came from Ronald Raiton, a leader of the conspiracy who testified for the prosecution as part of a plea bargain. The jury found defendants guilty as charged, except that D'Amico was acquitted on one count.

Defendants raise numerous issues in these appeals, but after careful review we deem it necessary to discuss only a few of them in detail. The appendix to this opinion lists the remainder of the contentions, all of which we find without merit.

I

Defendants contend that the indictment was duplicitous because the conspiracy count charges them with two separate offenses. They also argue there was a variance between the conspiracy charged in the indictment and the proof offered at trial.

Duplicity is the joining of two or more distinct offenses in a single count, so that a general verdict does not reveal exactly which crimes the jury found the defendant had committed. 1 C. Wright, FEDERAL PRACTICE AND PROCEDURE §142 (1982). According to defendants, Count One charges two separate conspiracies — one to manufacture and distribute metham-

phetamine, and another involving P2P. They rely on *United States v. Starks*, 515 F.2d 112, 116 (3d Cir. 1975), where we instructed trial courts to require the government to elect between duplicitous charges at trial, or else suffer dismissal of the indictment.

Starks does not support the defendant's position. The single-count indictment in that case charged the defendants with conspiracy to extort and attempt to extort — two separate crimes. In contrast, the count at issue here charges defendants with only one crime: a conspiracy. Although the illegal agreement had two objectives, the count is not duplicitous. " 'The conspiracy is the crime, and that is one, however diverse its objects.' " *Braverman v. United States*, 317 U.S. 49, 54 (1942), *quoting Frohwerk v. United States*, 249 U.S. 204, 210 (1919). *See also* W. LaFave and A. Scott, CRIMINAL LAW §62 (1972) ("An agreement to commit several crimes is but one conspiracy."). Accordingly, we reject the defendant's duplicity attack.

We turn next to the variance argument. Defendants assert the proof at trial showed the existence of many different and unrelated conspiracies, and the spillover of evidence prejudiced them. They rely on *Kotteakos v. United States*, 328 U.S. 750 (1946), where the Supreme Court reversed the convictions of individuals who had been indicted as participants in a single conspiracy because the prosecution proved the existence of several unrelated schemes. *See also United States v. Camiel*, 689 F.2d 31 (3d Cir. 1982). In reviewing the defendants' argument, we must examine the record to determine whether, viewed in the light most favorable to the government, there is sufficient evidence of a single conspiracy to support the verdict. *United States v. Boyd*, 595 F.2d 120, 123 (3d Cir. 1978).

At trial, the government proved the existence of an international drug ring that grossed millions of dollars. In the summer of 1978, DiSantis made Raiton a partner in his methamphetamine laboratory in Plymouth Meet-

ing near Philadelphia. The two men soon decided to expand production, and opened a new laboratory in Upper Darby. This facility was shut down after DiSantis and one of the chemists were arrested for narcotics possession, but DiSantis and Raiton later started another one in Bucks County and hired a different chemist. During this time, the partners employed Gomberg and Spielvogel, who formed sham companies to purchase the essential ingredients for methemphetamine, particularly P2P. Levy, an attorney who shared office space with the partners, was retained in an attempt to gain the release of a shipment of P2P seized by federal drug agents.

DiSantis and Raiton also arranged to have P2P brought into the United States from France and Germany. Some deliveries were sent to a sham company in Philadelphia; others were routed through Miami. In addition, Levy organized a forwarding company in Canada to import the European P2P and hold it for shipment into the Philadelphia area.

When the supply of P2P exceeded their own manufacturing needs, DiSantis and Raiton began to sell the chemical to other drug dealers. The partners hired D'Amico to assist Gomberg in making deliveries and collecting money. On one occasion, D'Amico siphoned P2P into smaller containers in a ruse to throw drug enforcement agents off the trial.

DiSantis and Raiton continued their mutual dealings even after the partnership was dissolved in late 1979. DiSantis kept the methamphetamine operation, and Raiton supplied him with P2P. During this time, Spielvogel was instrumental in smuggling P2P into the United States from the Bahamas. The entire operation was finally broken up after Raiton and one of his customers agreed to cooperate with the government in 1981.

These facts suffice to show the existence of a single conspiracy in which all defendants knowingly participated. A division of labor among conspirators in pursuit of a

common goal does not necessitate a finding of discrete schemes. *See United States v. Elam*, 678 F.2d 1234, 1246-47 (5th Cir. 1982); *United States v. Boyd*, 595 F.2d at 123. Moreover, the trial judge explicitly directed the jury's attention to the unitary conspiracy issue. *See also United States v. Kenny*, 462 F.2d 1205, 1217 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). He charged the jury: "What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed then you must acquit the defendants as to that charge. . . . In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other separate conspiracy." In applying these instructions to the evidence, the jury could reasonably find that defendants had all agreed to participate in one common drug enterprise.

In a related argument, defendants contend that the trial judge erred in refusing to instruct the jury that a defendant could be found guilty only if "he agreed to perform the two things charged, to manufacture methamphetamine and to distribute P2P." The jury was told instead that "one may become a member of a conspiracy without full knowledge of all of the details of the alleged unlawful scheme. . . . So if a defendant with an understanding of the unlawful character of a plan knowingly and willfully joins in an unlawful scheme on one occasion that is sufficient to convict him for conspiracy. . . ."

These instructions were proper. The test for conspiracy is whether a defendant agreed to participate in an unlawful scheme, with knowledge of its "essential nature." *Blumenthal v. United States*, 332 U.S. 539, 557 (1947). A conspirator need not know all the details of the enterprise, *United States v. Boscia*, 573 F.2d 827, 834 (3d Cir.), *cert. denied*, 436 U.S. 911 (1978), nor join in all its illegal objectives. *See also United States v. Mur-*

ray, 618 F.2d 892, 898 (2d Cir. 1980); *United States v. Carman*, 577 F.2d 556, 567 (9th Cir. 1978); *United States v. Bolts*, 558 F.2d 316, 325-26 (2d Cir.), *cert. denied*, 434 U.S. 930 (1977).[1]

Finally, some defendants contended at trial that their participation in the conspiracy ended before P2P was listed as a controlled substance in February 1980. They attack their convictions on the ground that the jury might have found that their roles were limited to possessing and distributing P2P at a time when it was not illegal to do so.

The limiting instruction given by the trial judge met the defendants' objection. The jury was told that a conspiracy merely to deal in an uncontrolled substance was not illegal. The judge carefully explained that a defendant implicated "solely in the possession, importation or distribution of P2P before that time [February 1980]" could not be found guilty, "unless he knew that the P2P was to be used in the manufacture of methamphetamine . . . and . . . he joined the conspiracy with the intent of aiding the conspiracy to carry out that illegal purpose." This limiting interpretation of the conspiracy did not amount to an improper amendment of the indictment, *see United States v. Milestone*, 626 F.2d 264 (3d Cir.), *cert. denied*, 449 U.S. 920 (1980), nor did it deny defendants notice of the crime charged.

In short, we find no reversible error on the conspiracy convictions.

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1. In the case at hand, the government proceeded on the theory that a person who joins a conspiracy having two unlawful aims is guilty even if he agrees to only one of them. Defendants complain that the trial judge concurred with the government on this point at a side bar conference. However, they cite no authority to show that this view of the law is wrong, and the *Murray*, *Carman* and *Bolts* cases indicate otherwise. In any event, the judge did not instruct the jury on the "one-is-enough" theory, and therefore the defendants' complaint is without substance.

II

DiSantis argues that he was sentenced improperly on Counts Two through Five. After being found guilty on all counts, he received the following sentences:

COUNT	*VIOLATION*	*SENTENCE*
I	Conspiracy to manufacture and distribute methamphetamine, and to distribute and possess with the intent to distribute P2P; 21 U.S.C. §846	Five years imprisonment and a $15,000 fine
II	Manufacture of methamphetamine; 21 U.S.C. §841 and 18 U.S.C. §2	Five years imprisonment, followed by five years special parole, and a $15,000 fine; consecutive to Count I
III	Possession with the intent to distribute methamphetamine; *id.*	Five years imprisonment, followed by five years special parole, and a $15,000 fine; consecutive to Count II
IV	Aiding and abetting the manufacture of methamphetamine; *id.*	Five years probation; consecutive to Count III
V	Attempt to possess with the intent to distribute P2P; 21 U.S.C. §846	Five years probation; concurrent with Count IV
VI	Continuing criminal enterprise; *id.* §848	Ten years imprisonment; concurrent with Counts I and II

In sum, DiSantis was sentenced on the conspiracy and substantive counts to a $45,000 fine and fifteen years in prison, followed by five years of special parole and five more years of probation. He also received a concurrent ten-year term for the section 848 continuing criminal enterprise count.

In *United States v. Gomez*, 593 F.2d 210, 212 (3d Cir.), *cert. denied*, 441 U.S. 948 (1979), we observed that the Comprehensive Drug Abuse Prevention and Control Act separates the various acts that establish criminal liability into discrete components. Correspondingly, "the penalty provisions of the Act have been orchestrated in meticulous detail." *Id.* at 213. The severity of the allowable sentences depends in part upon the type of drug, the intended use, the defendant's prior convictions, and the age of the consumer.

The Act makes conspiracies subject to punishment separate and apart from the substantive offenses. 21 U.S.C. §846. In addition, section 848 imposes severe, separate penalties on individuals who engage in continuing criminal enterprises.[2] This section reaches indi-

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2. Section 848 provides in part:

"(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

* * *

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if —

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter —

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources."

Section 848(c) prohibits suspension of sentence, probation and parole.

viduals found guilty of felonies that are committed as part of a continuing series of violations of the Act. The defendant must reap substantial gain from these offenses, and undertake them in concert with five or more other persons whom he oversees in a managerial capacity.

Section 848 subjects first offenders to mandatory prison terms ranging from ten years up to life. A defendant may also be fined as much as $100,000 and ordered to forfeit the profits obtained from the enterprise. No sentence may be suspended, and probation and parole are prohibited.

The evidence in this case amply supports the verdict against DiSantis on all counts, and the ten-year sentence on Count Six is the minimum provided by section 848. Defendant argues, however, that *Jeffers v. United States*, 432 U.S. 137 (1977), requires us to vacate his sentences on Counts One through Five as cumulative to the penalty imposed on him for the continuing criminal enterprise.

We begin by considering how *Jeffers* bears on the sentence on Count One for conspiracy. In that case, a defendant was charged in one indictment with a conspiracy violating section 846, and in another with a continuing criminal enterprise violating section 848. After successfully resisting the government's motion to try the two charges together, he was convicted of conspiracy at the first trial and sentenced to fifteen years imprisonment plus a $25,000 fine. At the second trial, he was found guilty of engaging in a continuing criminal enterprise and given the maximum sentence of life imprisonment in addition to a $100,000 fine. This sentence was made consecutive to the first one.

The defendant in *Jeffers* argued that the second trial violated the ban against successive prosecutions for the same offense. He contended that for double jeopardy purposes a section 846 conspiracy is a lesser included offense of a section 848 continuing criminal enterprise.

A divided Supreme Court rejected the defendant's double jeopardy claim. Four members of the Court reasoned that the defendant's opposition to a consolidated trial waived any viable defense to consecutive prosecutions for the same offense. Justice White concurred in affirming the section 848 conviction, but on different grounds.

In discussing the double jeopardy issue, the plurality opinion by Justice Blackmun assumed *arguendo* that conspiracy is a lesser included offense of a continuing criminal enterprise. *Id.* at 149-50. The plurality clearly stated, however, that it was not deciding this issue: "[B]efore this case it was by no means settled law that §846 was a lesser included offense of §848. . . . Even now, it has not been necessary to settle that issue definitively." *Id.* at 153 n.20.

The plurality then considered whether Congress intended to permit cumulative punishments under sections 846 and 848. Justice Blackmun noted that this multiple punishment issue would arise even if the two indictments had been tried together, *id.* at 154 n.23, thus treating the situation like the trial of Counts One and Six in the case at hand. Although he found the legislative history "inconclusive", *id.* at 156, Justice Blackmun observed that the usual policy offered in support of separate punishments for a conspiracy and its underlying substantive offenses does not apply to these two provisions. The additional dangers posed by section 846 conspiratorial activity are already encompassed by the "in concert" requirement of section 848, and "[t]hus, there is little legislative need to further this admittedly important interest by authorizing consecutive penalties from the conspiracy statute." *Id.* at 157.

Although the plurality recognized that the trial court had "the power to sentence [the defendant] to whatever penalty was authorized" by section 848, it concluded that the second fine imposed on the defendant must be reduced so that the total amount on the two

convictions did not exceed $100,000 — "the maximum permitted by §848." *Id.* There was no need to consider the defendant's two prison sentences, however, since he was not eligible for parole at any time on the section 848 life term. *Id.* at 155 n.24. The four justices who dissented from the affirmance of the section 848 conviction on the ground that it violated double jeopardy concurred in the judgment to the extent that it vacated the cumulative fines.

Because of the diverse views espoused by the justices, *Jeffers* holds only that a defendant found guilty of both a section 846 conspiracy and a continuing criminal enterprise may not be fined in excess of the maximum authorized by section 848. This narrow holding does not dictate that we vacate the prison term imposed on DiSantis for conspiracy.[3] Nevertheless, like the plurality in *Jeffers*, *id.* at 156 n.26, we discern a congressional intent against cumulative punishment in the structure of the Comprehensive Drug Abuse Prevention and Control Act itself.

By authorizing life imprisonment without parole, the most severe sentence short of execution that can be imposed, Congress provided the courts with expansive power to punish a defendant who engages in a continuing criminal enterprise. There are substantial economic sanctions as well. As mentioned earlier, section 848 au-

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3. *Jeffers* has often been cited inaccurately as holding that a conspiracy is a lesser included offense of a continuing criminal enterprise. *See, e.g.*, United States v. Barnes, 604 F.2d 121, 156 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). Some cases have even construed this purported holding as requiring that a conviction and sentence under section 846 must be set aside when the defendant is also found guilty at the same trial of violating section 848. *See* United States v. Smith, 690 F.2d 748, 750 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3685 (U.S. March 21, 1983); United States v. Lurz, 666 F.2d 69, 75, 81 (4th Cir. 1981), *cert. denied*, 445 U.S. 1005 (1982); United States v. Johnson, 575 F.2d 1347, 1354 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979). In these three cases, the government conceded that this interpretation of *Jeffers* was correct.

thorizes the trial court to fine a defendant up to $100,000 and strip him of his profits and interests in the enterprise. To pyramid an additional sentence for conspiracy, whether a prison term or a fine, would "undermine and distort the detailed penalty scheme which Congress so carefully constructed" in the Act. *United States v. Gomez*, 593 F.2d at 214. Our review of the statute persuades us, therefore, that Congress did not intend the courts to impose a penalty for a section 846 conspiracy in addition to the section 848 sentence.

Since DiSantis also attacks his sentences on Counts Two through Five, we must decide whether the ban on cumulative sentencing applies as well to the substantive drug offenses used as predicates for a continuing criminal enterprise charge.[4]

The Supreme Court did not consider this question in *Jeffers*, and the courts of appeals are not in agreement. Much of the confusion in the appellate opinions results from a failure to recognize that the holding in *Jeffers* is limited to the relationship between a continuing criminal enterprise and conspiracy, and that the Court did not decide the lesser included offense issue. Nor do the cases always respect the distinction in double jeopardy analysis between successive prosecutions and multiple punishments.[5]

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4. The trial judge charged the jury on Count Six that the government must prove defendant committed three or more of the offenses charged in Counts Two, Three, Four or Five as part of a continuing series of violations of the federal drug laws. Since defendant was found guilty on all of these counts, we need not decide whether conviction on three or more substantive offenses is necessary for conviction under §848. *Compare* cases collected in United States v. Lurz, 666 F.2d 69, 78 (4th Cir.), *cert. denied*, 455 U.S. 1005 (1982), *with* those collected in United States v. Michel, 588 F.2d 986, 1000 n.15 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979).

5. *See, e.g.*, United States v. Smith, 690 F.2d 748, 750 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3685 (U.S. March 21, 1983) (relying on *Jeffers* to reverse conviction under §846 as lesser included offense of §848, but affirming without discussion conviction on sub-

In *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), the Supreme Court observed that the fifth amendment guarantee against double jeopardy forbids three separate evils: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. Under the test established in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), two offenses are the same for double jeopardy purposes unless each one requires proof of a fact that the other does not. The *Blockburger* test always deems a lesser included offense the same as the greater because by definition the greater offense includes all the elements of the lesser. By their nature, the predicate violations in a compound statute like section 848 are lesser included offenses.

At the time *Jeffers* was written, however, the Court had become equivocal about whether the double jeop-

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NOTE — (*Continued*)

stantive counts); United States v. Chagra, 669 F.2d 241, 261-62 n.30 (5th Cir.), *cert. denied*, 51 U.S.L.W. 3255 (U.S. Oct. 4, 1982) (vacating §841 fine as cumulative to §848 fine, as required by "[t]he discussion of Congressional intent in *Jeffers*"); United States v. Chagra, 653 F.2d 26, 32 (1st Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (citing *Jeffers* for proposition that the legislative "history might suggest an intent not to punish for both the §848 violation and the offenses used to prove that violation"); United States v. Barnes, 604 F.2d 121, 155-56 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980) (relying on *Jeffers* as authority against imposition of penalty for conspiracy on defendant given maximum sentence on §848, but affirming additional sentence for substantive offenses); United States v. Valenzuela, 596 F.2d 1361, 1364-65 (9th Cir.), *cert. denied*, 444 U.S. 865 (1979) (rejecting argument that *Jeffers* requires court to vacate prison sentences for conspiracy and predicate offenses imposed on defendant who also received life imprisonment under §848); United States v. Johnson, 575 F.2d 1347, 1354 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979) (citing *Jeffers* as authority against consecutive sentences on §§846 and 848, but affirming without discussion additional prison terms for substantive violations).

ardy clause offers independent protection against cumulative punishment. In later cases, a clear majority finally emerged for the proposition that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 51 U.S.L.W. 4093 (U.S. Jan. 19, 1983). Thus, the propriety of cumulative sentencing is entirely a legislative matter, and the lesser included offense rationale is often a misleading way to discern congressional intent in predicate offense statutes.

The *Blockburger* test still may be used to ascertain the legislative aim when it is not otherwise expressed, since Congress ordinarily does not intend to punish the same offense under two different statutes. *See Whalen v. United States*, 445 U.S. 684, 692 (1980). But as Justice Rehnquist pointed out in his *Whalen* dissent, the *Blockburger* test is "less satisfactory, and perhaps even misdirected, when applied to statutes defining 'compound' and 'predicate offenses.' " *Id.* at 708. In these situations, *Blockburger* should be used with caution, bearing in mind that the question to be resolved is legislative intent, not double jeopardy. If the congressional purpose as to cumulative punishment can be discerned from the language of the statute, its structure, or its legislative history, then the inquiry is at an end. *See Albernaz v. United States*, 450 U.S. 333, 340 (1981). Recourse to the *Blockburger* test is appropriate only if these sources fail.

We need not resort to *Blockburger* here. As we see it, the structure of the Act, with its series of graduated penalties culminating in the extremely harsh punishment for continuing criminal enterprises, shows that Congress intended the courts to rely on section 848 alone for sentencing purposes. Cumulative sentences on the underlying predicate violations are not necessary to carry out the congressional purpose of severely punishing the leaders of narcotic rings.

In short, we conclude that Congress did not intend a defendant found guilty of a continuing criminal enterprise to be punished as well for conspiracy and substantive predicate offenses. The DiSantis case must therefore be remanded for resentencing.

We are not unmindful of the practical problems that confront district judges in sentencing defendants like DiSantis. In *United States v. Gomez*, 593 F.2d at 213, we rejected the contention that a trial court should enter judgment of conviction on the most inclusive offense alone, and not on those counts for which cumulative sentences are forbidden. As we pointed out, a defendant might avoid all punishment for his crimes if an appellate court reversed the single conviction on the compound offense but would have upheld the convictions on the less inclusive counts. To avoid that possibility, we directed the district court to impose a general sentence on all counts for a term not exceeding the maximum possible sentence on the count authorizing the greatest penalty. *Id.* at 216-17. *See United States v. Corson*, 449 F.2d 544 (3d Cir. 1971); *see also Zant v. Stephens*, 51 U.S.L.W. 4891, 4896 and n.21 (U.S. June 21, 1983).

One of the concerns expressed in *Gomez* was that on remand the double jeopardy clause might prevent the trial judge from imposing a greater sentence on the remaining counts than he had originally ordered. 593 F.2d at 217 n.18. Since then, we held in *United States v. Busic*, 639 F.2d 940, 950 (3d Cir.), *cert. denied*, 452 U.S. 918 (1981), that the Constitution does not forbid a district court from resentencing a defendant *de novo* and imposing a more severe sentence if it so chooses.[6] To

6. As part of an overall sentencing plan for the defendants in *Busic*, the district court distributed the heaviest penalties on the counts that were later reversed, and imposed lighter punishments on the other counts. We remanded for resentencing on the counts that were upheld, without limiting the trial judge to the prison terms he had originally assessed. Since the maximum penalty provided by statute on the surviving counts made it impossible for the

avoid the necessity for remands, the general sentencing procedure recommended in *Gomez* should be followed in cases where a defendant convicted under section 848 is also found guilty of conspiracy or substantive offenses.

All of the defendants' convictions will be affirmed, as will all of the sentences except those imposed on Joseph DiSantis, Jr. His case will be remanded to the district court for imposition of a general sentence consistent with this opinion.

APPENDIX

The following contentions, reproduced verbatim from the defendants' briefs, are rejected as without merit. All defendants adopt each others' arguments to the extent they are applicable.

David Gomberg, appellant in Nos. 82-1258/1534:

— The joinder of the defendant with co-defendants against whom the government had voluminous evidence of crimes unrelated to the defendant was prejudicial and impermissible.

— The second trial of the defendant on charges arising from the same drug conspiracy violated the double jeopardy clause.

— The charges of manufacturing and aiding and abetting the manufacturing constituted a single continuous offense and convictions on both charges constitute double punishment.

Harold Levy, appellant in No. 82-1477:

— Appellant should have been afforded relief for the government's conduct in making a material witness unavailable to him.

NOTE — *(Continued)*
sentence on remand to exceed the total previously imposed, we did not have to decide whether the new aggregate sentence may be greater than the original one. 639 F.2d at 953 n.14.

— Appellant should have been permitted to subpoena at trial records of the Internal Revenue Service, the U.S. Probation Office, and the New Jersey state probation office concerning the government's chief witness.
— A letter referring to appellant should have been excluded from evidence as inadmissible hearsay.
— A mistrial should have been declared when the government rebutted appellant's closing remarks by way of pejorative and prejudicial remarks concerning appellant and appellant's counsel.
— The sentence imposed upon appellant was unduly harsh and so disparate when compared with sentences imposed upon other co-conspirators as to violate appellant's constitutional rights.
— The indictment should have been dismissed as a result of the government's misconduct in connection with the investigation of this case.

Michelle D'Amico, appellant in No. 82-1478:
— The defendant D'Amico was entitled to a new trial in light of the fact that the trial court erred in denying the defendant's motion for mistrial.

Albert Spielvogel, appellant in No. 82-1479:
— There was insufficient evidence upon which the jury could have returned a verdict of guilty as to Count Two and appellant's motion under Rule 29(c) was improperly denied.
— Convictions on Counts One and Two must be reversed due to the admission of evidence of other crimes which unfairly prejudiced the jury.
— The trial judge improperly refused to require the government to turn over *Brady* material and denied the defendant access to *Brady* material.

Joseph DiSantis, Jr., appellant in No. 82-1485:

— Appellant's conviction on Count 1, the conspiracy count, should be reversed because of erroneous jury instructions and because one of the objectives of the conspiracy, distribution of phenylacetone, is not a federal crime due to its placement on controlled substances Schedule II through defective administrative procedure.

— The convictions on Counts 2 and 3 should be vacated and the case remanded for either dismissal or a new suppression hearing due to the grossly negligent, and possible willful, misrepresentation by the prosecutor to the court and defense concerning a material issue of fact at the suppression hearing.

— Appellant's conviction and sentence for manufacture of methamphetamine on Count 4 must be vacated because it is the same manufacturing offense charged in Count 2; such single offense was divided into two separate counts by reference to arbitrary temporal limits, not proper units of prosecution under 21 U.S.C. §841.

— Appellant's conviction on Count 5 must be reversed due to the doctrine of legal impossibility.

— The Count 6 continuing criminal enterprise conviction should be reversed: (1) due to the doctrine of collateral estoppel which barred admission of cocaine conspiracy activities which, in part, were the subject of appellant's earlier federal acquittal of conspiracy to deliver cocaine; (2) the uncharged cocaine transactions were not part of the "continuing series of violations" charged in this indictment; (3) some or all of the predicate offenses are flawed and jury's general

verdict on Count 6 could have been based on a flawed predicate.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1477

UNITED STATES OF AMERICA

v.

HAROLD LEVY,
Appellant

SUR PETITION FOR PANEL REHEARING

Present: WEIS AND HIGGINBOTHAM, Circuit Judges, and BROTMAN, District Judge*

The petition for panel rehearing filed by appellant in the above case having been submitted to the judges who participated in the decision of the court, and after consideration of said petition, it is

ORDERED that the petition for panel rehearing is denied.

BY THE COURT,

/s/ Weis

Dated: September 29, 1983

*The Honorable Stanley Seymour Brotman, United States District Judge for the District of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1477

UNITED STATES OF AMERICA

v.

LEVY, HAROLD,
Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until November 28, 1983.

/s/ Weis
CIRCUIT JUDGE

DATED: October 12, 1983

No. 83-894

In the Supreme Court of the United States

OCTOBER TERM, 1983

HAROLD LEVY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-894

HAROLD LEVY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied a fair trial by the district court's refusal to immunize and order the deposition, at government expense, of a co-defendant who resided in Canada, and by the alleged suppression of impeachment material relating to a government witness.[1]

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[1]Petitioner also contends (Pet. 25-26) that the classification of phenyl-2-propanone as a Schedule II controlled substance was invalid on the ground that the Drug Enforcement Administration failed to comply with the rulemaking procedures set forth in the Administrative Procedure Act, 5 U.S.C. 553. With respect to this claim, which petitioner concedes he did not expressly raise in the court of appeals, petitioner has adopted the arguments raised in the petition for a writ of certiorari in *Catanese* v. *United States*, cert. denied, No. 83-5005 (Nov. 28, 1983). We rely on our memorandum in opposition to the petition in that case, a copy of which has been sent to petitioner's counsel.

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to manufacture and distribute methamphetamine and to distribute phenyl-2-propanone (P2P), in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment and a fine of $5,000. The court of appeals affirmed (Pet. App. A1-A21; 715 F.2d 843).

The evidence at trial showed that from May 1978 through January 1982 co-conspirators Ronald Raiton and Joseph DiSantis, Jr., participated in an "international drug ring that grossed millions of dollars" (Pet. App. A5). During that period, petitioner, an attorney who shared offices in Philadelphia with Raiton and DiSantis, tried to persuade the Drug Enforcement Administration to return 10 gallons of P2P that had been seized from his co-conspirators, falsely claiming that the P2P was not to be used to manufacture methamphetamine (C.A. App. 796a-804a, 1523a-1526a; Pet. App. A6). Petitioner also organized a Canadian company, L-K Forwarding, through which the conspirators imported P2P from abroad for subsequent shipment to the Philadelphia area (C.A. App. 840a-844a, 846a-849a; Pet. App. A6). Between February and September 1979, L-K Forwarding imported at least four 55 gallon drums of P2P (C.A. App. 834a).[2]

2. Petitioner contends (Pet. 14-24) that he was denied a fair trial as a result of the district court's refusal to grant immunity to co-defendant Theodore Karrys and to permit Karrys' deposition in Canada at government expense, coupled with the alleged suppression by the government of

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[2]Petitioner's share of the illicit profits was linked to the conspirators' success in bringing the P2P into the United States, but because his confederates did not give him an accurate accounting of their illicit activities, petitioner received only $75,000 (C.A. App. 834a, 850a).

impeachment material concerning co-conspirator Raiton, who testified for the government at trial. This contention is without merit.

a. Karrys is a Canadian citizen who was indicted along with petitioner. Prior to trial, petitioner filed a motion requesting the district court to grant Karrys immunity and to order that Karrys' deposition be taken in Canada at government expense pursuant to Rule 15 of the Federal Rules of Criminal Procedure (C.A. App. 416a-417a). Petitioner also moved for dismissal of the indictment, alleging that the government had no intention of extraditing Karrys and had indicted him solely to prevent him from testifying as a defense witness (C.A. App. 648a). The government refuted petitioner's assertions, noting that it was in the process of seeking Karrys' extradition (C.A. App. 592a, 646a-647a). The district court denied petitioner's motions (C.A. App. 426a, 648a-649a).

As petitioner candidly concedes (Pet. 17, 22), his motion seeking immunity for Karrys and a deposition order under Rule 15 was "deficient in that it was unsupported by affidavit or other proof" and was therefore "properly denied." He claims (Pet. 17), however, that it became apparent during the trial that Karrys' testimony was "crucial" to his defense and that "the government had no real intention of prosecuting Karrys." In these circumstances, petitioner contends, the district court improperly denied his "renewed" requests for immunity for Karrys and for a deposition order.

Petitioner cites no authority for the proposition that a district court must confer immunity on an unavailable co-defendant at the behest of a defendant seeking to obtain the co-defendant's testimony at his trial. Indeed, the courts of appeals have generally refused to require immunization of defense witnesses even where the witnesses were not under indictment and were physically available to testify at trial,

and this Court has consistently declined to review the issue. See, *e.g.*, *United States* v. *Turkish*, 623 F.2d 769, 771-778 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Klauber*, 611 F.2d 512, 517-520 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Lenz*, 616 F.2d 960, 962-964 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *United States* v. *Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979); *United States* v. *Hunter*, 672 F.2d 815, 818 (10th Cir. 1982). Although the Third Circuit, in *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (1980), held that defense witness immunity is available in certain circumstances,[3] that court properly rejected petitioner's immunity claim in this case.

Here, Karrys was a co-defendant who was unavailable either to answer the charges or to testify on behalf of petitioner at the trial. Petitioner's claim (Pet. 17) that the government had no intention of extraditing Karrys is totally unsubstantiated and was expressly contradicted by the prosecutor during the trial proceedings.[4] Moreover, petitioner's bare assertion (Pet. 17) that it became apparent during the trial that Karrys' testimony was crucial to his defense is unfounded. Karrys' allegedly "exculpatory" account relating to the Canadian forwarding company

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[3]In *Smith*, the defendant requested the court to confer immunity on an exculpatory witness, a juvenile subject exclusively to the jurisdiction of local Virgin Islands authorities. The local authorities offered the witness immunity, but, as a matter of prosecutorial courtesy, stated that the offer was conditional on the consent of the United States Attorney, who inexplicably refused to consent.

[4]Petitioner correctly points out (Pet. 23) that Karrys has never been extradited from Canada for trial on the instant indictment. We are informed by the United States Attorney that the government's formal request for Karrys' extradition was denied by the Canadian Government.

organized by petitioner and used by the conspirators as a conduit for European P2P was introduced into evidence through the testimony of a Canadian police officer who had interviewed Karrys (C.A. App. 1843a-1864a). That account, which essentially consisted of Karrys' statement that he dealt only with co-conspirator Raiton regarding the specifics of importing P2P into Canada, and his self-serving claim that petitioner had told him to make sure that possession of P2P was legal in Canada, was not clearly exculpatory and, in fact, corroborated the evidence linking petitioner to the conspiracy. In these circumstances, there is no basis for concluding that the district court abused its discretion by refusing to immunize Karrys.

Petitioner's related claim with respect to the deposition order is similarly without merit and does not present a question of general importance warranting this Court's review. Petitioner relies (Pet. 19-21) on *United States* v. *Wilson*, 601 F.2d 95 (3d Cir. 1979), but that case is clearly distinguishable. The court in *Wilson* held that the defendant was entitled to an order under Fed. R. Crim. P. 15 for the deposition of a witness (not a co-defendant) who was residing in Spain, where that witness had agreed to be deposed and had provided an affidavit that partly exculpated the defendant, and where there were serious questions about the credibility of an accomplice on whose testimony the government's case rested. 601 F.2d at 96-99. In the instant case, by contrast, there was no showing that Karrys could have exculpated petitioner, or even that he was willing to be deposed. On the contrary, in light of petitioner's immunity request for Karrys, it is apparent that Karrys would not have been willing to be deposed (see C.A. App. 417a). Thus, an order for his deposition would have contravened Fed. R. Crim. P. 15(d), which explicitly states that a deposition may not "be taken of a party defendant without his consent."

b. Nor is there any merit to petitioner's bald contention (Pet. 14-16) that the government "suppressed" material that could have been used to impeach co-defendant Raiton's testimony. The government provided the defense in this case with "voluminous" discovery materials (C.A. App. 557a), much of which concerned Raiton's background,[5] and Raiton was subjected to lengthy and and vigorous cross-examination at trial (see C.A. App. 1053a-1414a). At no time did Raiton deny that he had a history of fraud, that he had suborned perjury, that he had bribed judges, that he had millions of dollars in Swiss bank accounts which he hoped the authorities could never reach, and that he had had business dealings with FBI agents and also with a former Assistant United States Attorney who had nothing to do with this case.

The only specific document that petitioner claims the government suppressed (C.A. App. 406a-410a) shows, according to petitioner (Pet. 15), that "only Raiton" dealt with a European company, Iraco, Ltd., that shipped P2P to the conspirators' Canadian forwarding company, L-K Forwarding. The heart of the government's case against petitioner, however, related to his efforts to secure the

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[5]The government's brief in the court of appeals describes some of the materials that were turned over to the defense (Gov't Br. 59-60):

> The defense received affidavits from the prosecutors who participated in the plea agreement negotiations with Raiton. They received the statement of [a] former Assistant United States Attorney * * * regarding the $50,000 loan he had from Raiton. They received the affidavits of the FBI agents who purchased real and personal property from Raiton. They received Raiton's statement to the IRS, and a list of the numerous corporations with which he did business. They received the information known to the government on Raiton's subornation of perjury in other cases. This is by no means an exhaustive list of the material the government provided to the defense.

release of P2P from the DEA's custody and to his organizing L-K Forwarding, rather than to any direct dealings he may have had with Iraco. Thus, there is no reason for this Court to review the conclusion of both courts below that the Iraco document provided no basis for disturbing petitioner's conviction.

Finally, petitioner asserts (Pet. 18, 23) that the government suppressed a tape recording made by a Canadian police officer during an interview of co-defendant Karrys. The Canadian officer testified that the recording in question was not available because of a policy of his department (C.A. App. 1852a). The unavailability of that recording in these circumstances clearly did not constitute a denial of due process by the United States. See *United States* v. *Friedman*, 593 F.2d 109, 120 (9th Cir. 1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1984